

IN THE IOWA DISTRICT COURT FOR HARDIN COUNTY

SUMMIT CARBON SOLUTIONS, LLC, Plaintiff, v. KENT KASISCHKE, Defendant.	CASE NO. CVCV101911 ORDER ON PLAINTIFF'S PETITION FOR INJUNCTIVE RELIEF
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This matter comes before the court for scheduled hearing on Plaintiff Summit Carbon Solutions, LLC's Petition for Injunctive Relief Pursuant to Iowa Code Section 479B.15. Attorneys Michael Hoernlein, Brian Boone, Nicole Coulter-Ledbetter, and Andrea Galvez appeared on behalf of Plaintiff. Attorney Brian Jorde appeared on behalf of Defendant Kent Kasischke. The hearing was reported. The court enters the following Order having considered the evidentiary record, applicable law, and arguments of counsel.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Summit Carbon Solutions, LLC (hereinafter "Summit") is in the process of conducting land surveys in five states, including Iowa, in furtherance of their proposed construction of an underground carbon dioxide pipeline. Defendant Kent Kasischke has not permitted Summit entry onto his property in Hardin County. Summit maintains that such access is necessary to conduct surveys and examinations related to the proposed pipeline.

Previously, the Iowa Utilities Board (hereinafter "IUB") held a public informational meeting in Hardin County on September 13, 2021, providing background information on Summit's proposed pipeline project and general project information to the public. P's Ex. 3. Notice of this meeting was provided to landowners as well as via publication in the Eldora

Herald-Ledger newspaper, which is published in Hardin County. P's Ex. 2. On January 28, 2022, Summit filed a Petition for a Hazardous Liquid Pipeline Permit with the IUB. P's Ex. 1.

On October 19, 2022, Summit filed an Amended Petition for Injunction Pursuant to Iowa Code § 479B.15 in this matter, requesting the court enter an injunction prohibiting Mr. Kasischke from interfering with its right enter his property and exercise its survey and examination rights pursuant to the statute. On October 27, 2022, Mr. Kasischke, through counsel, filed his Answer and Counterclaim. In his Answer, he admitted that Summit is a "pipeline company" and that he is a "landowner" within the meaning of Iowa Code chapter 479B. He maintains that Summit did not comply with the statutory requirements of section 479B.15 prior to seeking an injunction. His claims regarding the constitutionality of section 479B.15 and requests for a declaratory judgment and temporary injunction were previously addressed by the court in its Order on Plaintiff's Motion for Summary Judgment entered herein on May 10, 2023.

At hearing on the Amended Petition for Injunction, Mr. Kasischke moved for leave of court to amend his answer, which was ultimately granted. He filed his First Amended Answer and Counterclaim on May 26, 2023, asserting a new denial of Summit's claim that it is a "pipeline company" within the meaning of Iowa Code chapter 479B. He maintains that as Summit failed to establish that the carbon dioxide that it intends to transport is in a liquified state, it is therefore not engaged in a type of activity regulated by Chapter 479B. The court held the evidentiary record open in order for the parties to submit supplemental affidavits on the sole issue of whether Summit is a "pipeline company."

Summit subsequently submitted the affidavit of its Chief Operating Officer, James Powell, who has worked in the pipeline and energy infrastructure industry for over twenty-five years. He attests that the proposed pipeline will capture and compress carbon dioxide to “supercritical state,” and it then will be transported across five states, including Iowa, to sequestration sites in North Dakota. He defines carbon dioxide as being in a “supercritical state” when it “is pressurized above its critical point, which results in converting the [carbon dioxide] to a fluid state.” Aff. of James Powell, May 23, 2023, p. 2. He further cites to the “carbon dioxide” definition promulgated by the United States Department of Transportation’s Pipeline and Hazardous Materials Safety Administration (hereinafter “PHMSA”), which defines carbon dioxide as “a fluid consisting of more than 90 percent carbon dioxide molecules compressed to a supercritical state.” *Id.* He further contends that Summit’s proposed pipeline will transport carbon dioxide that meets PHMSA’s definition. *Id.*

In support of his argument that Summit is not a “pipeline company” within the meaning of Chapter 479B, Mr. Kasischke submitted affidavits from two chemical engineers. Aff. of Richard Kuprewicz, May 30, 2023; Aff. of Jasper Hardesty, May 30, 2023. Both affiants state that carbon dioxide in its supercritical phase is not the same as carbon dioxide in its liquid phase. *Id.* That said, the carbon dioxide phase diagrams referenced by both affiants show that carbon dioxide in its “supercritical fluid” phase is under higher temperature and potentially higher pressure than carbon dioxide in its liquid phase. *Id.* While both affiants stated that their respective opinions are provided “to a reasonable degree of professional science and engineering certainty and are based upon [their] education, training, background, and experience,” neither affiant identifies their education, training, background, or experience. *Id.*

In addition, both affidavits are nearly identical to one another, despite the fact that neither affiant attests to any familiarity with the other.

Pursuant to Iowa Code section 479B.15, Summit sent Mr. Kasischke three separate ten-day notices of its intent to enter his land to survey and examine his property via restricted certified mail on March 12, 2022, July 14, 2022, and May 4, 2023. P's Ex. 4, 5, 7, 8, 17, 18. The mailing labels for these mailings, generated by the United States Postal Service (hereinafter "USPS"), state that the letters were sent via "CERTIFIED MAIL" and "RESTRICTED DELIVERY." The March 12th letter was delivered to Mr. Kasischke on March 19, 2022. P's Ex. 5. The July 14, 2022 and May 4, 2023 letters were refused. P's Ex. 8, 18.

At hearing, Mr. Kasischke testified regarding a purported farm tenant on his property and Summit's mailings. The court found him to be unconvincing and, at several points, not credible. He maintains that he has had a cash rent farm lease with Luke Mannerter for the past nine years. He argues that Mr. Mannerter is therefore entitled to notice under Iowa Code section 479B.15; it is uncontested that Mr. Mannerter did not receive notice. However, other than his own testimony, Mr. Kasischke did not offer any additional evidence in support of this contention. There was also no evidence presented to identify what land is subject to Mr. Mannerter's claimed leasehold interest.

Mr. Kasischke's testimony regarding Summit's mailings was disingenuous. He testified that he did not receive the notice letter from Summit dated March 12, 2022. However, when presented with the return receipt for this mailing, he stated that "it appears to be" his signature on the receipt. P's Ex. 6. He also maintains that he never refused any letters from Summit, and that the postal tracking records that note the mailings were refused are incorrect. P's Ex. 8, 18.

In general, his testimony was at best evasive. On cross-examination, he refuted Summit's contention that he has known for over a year that it intended to enter his property. He testified that "neighbors," and no one else, have told him to refuse delivery of Summit's letters. He denied ever being asked to identify any tenants on his property. On the whole, the court did not find his testimony to be convincing.

CONCLUSIONS OF LAW

Summit maintains that it has met the requirements of Iowa Code section 479B.15 and that the court should grant its request for injunctive relief. Mr. Kasischke argues that the court must dismiss Summit's Petition because it failed to include Mr. Mannetter as a party to this action, failed to establish that it would suffer irreparable harm or substantial injury without injunctive relief, and because it failed to comply with the notice requirements of the statute.

Mr. Kasischke first posits that Summit's Petition must fail because Mr. Mannetter is not a named defendant in this action, citing *Tod v. Crisman*, 99 N.W. 686, 688-89 (Iowa 1904). In *Tod*, the Iowa Supreme Court defined a "necessary and indispensable" party as one

having an interest of such a nature that a final decree cannot be entered without either affecting their interests, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience.

Id. at 688. However, the omission of such a party does not deprive the court of subject-matter jurisdiction nor personal jurisdiction over the named parties. *Id.* at 689. The court therefore finds that the omission of Mr. Mannetter as a named defendant does not preclude the entry of judgment in this matter.

Mr. Kasischke also argues that as Summit failed to prove that it would suffer irreparable harm or substantial injury absent the issuance of an injunction, it is not entitled to relief. The

court agrees that a petition for injunction generally invokes the court's equitable jurisdiction, as recognized in Iowa Rules of Civil Procedure 1.1501-1.1511. *Ney v. Ney*, 891 N.W.2d 446, 450 (Iowa 2017). However, the "irreparable harm or substantial injury" requirement need not be established when a statute itself expressly authorizes injunctive relief, as is the case here. Iowa Code § 479B.15. Thus, the conditions precedent in section 479B.15 "'supersede the traditional equitable requirements.'" *Ney*, 891 N.W.2d at 450-51 (quoting *Max 100 L.C. v. Iowa Realty Co.*, 621 N.W.2d 178, 181 (Iowa 2001)); see also *Worthington v. Kenkel*, 684 N.W.2d 228, 233 (Iowa 2004).

The court will therefore determine whether Summit has complied with the statutory requirements for injunctive relief pursuant to Iowa Code chapter 479B. Iowa Code section 479B.15 provides that

[a]fter the informational meeting. . . a pipeline company may enter upon private land for the purpose of surveying and examining the land to determine direction or depth of pipelines by giving ten days' written notice by restricted certified mail to the landowner as defined in section 479B.4 and to any person residing on or in possession of the land. The entry for land surveys. . . may be aided by injunction.

Therefore, in order for Summit to establish that it is entitled to its request for an injunction in this matter, it must prove that it is a "pipeline company" within the meaning of Chapter 479B; that an informational meeting was held and proper notice given; and that it provided ten days' written notice to Mr. Kasischke "and any person residing on or in possession of the land" of its intent to enter onto the land. *Id.*

The court will first address Mr. Kasischke's newly-raised argument that Summit is not a "pipeline company" within the meaning of Iowa Code chapter 479B. Iowa Code section 479B.2(4) defines a "pipeline company" as

a person engaged in or organized for the purpose of owning, operating, or controlling pipelines for the transportation or transmission of any hazardous liquid or underground storage facilities for the underground storage of any hazardous liquid.

A "pipeline" is defined as "an interstate pipe or pipeline and necessary appurtenances used for the transportation or transmission of hazardous liquids." Iowa Code § 479B.2(3).

"Hazardous liquid" is defined as "crude oil, refined petroleum products, liquefied petroleum gases, anhydrous ammonia, liquid fertilizers, liquefied carbon dioxide, alcohols, and coal slurries." Iowa Code § 479B.2(2).

Prior to hearing on Summit's request for an injunction, Mr. Kasischke admitted that Summit is a "pipeline company" within the meaning of the statute. Now, he argues that Summit cannot be granted relief under Chapter 479B, as it will be transporting carbon dioxide in phases other than in its liquefied state. He maintains that as Summit's proposed pipeline will be used to transport carbon dioxide in its "supercritical" phase, it is not engaged in the type of activity governed by Chapter 479B. Summit argues that the evidence is clear that it is a "pipeline company" pursuant to Chapter 479B.

The court is unaware of any previous ruling or opinion addressing this issue in the context of carbon dioxide pipelines such as the one proposed by Summit. However, based upon the evidentiary record, the Iowa Legislature's purpose in enacting Chapter 479B, and the plain meaning of the terms utilized in that chapter, the court rejects this frivolous argument.

The Iowa Legislature enacted Chapter 479B in part “to protect landowners and tenants from environmental or economic damages which may result from the construction, operation, or maintenance of a hazardous liquid pipeline[.]” Iowa Code § 479B.1. It included “liquefied carbon dioxide” as part of its definition of a hazardous liquid. Iowa Code § 479B.2(2). Given the purpose of Chapter 479B, it would be nonsensical to hold that companies transporting carbon dioxide through pipelines at higher temperatures and higher pressures than carbon dioxide in its liquid phase are exempt from its requirements. It is therefore clear that Summit’s proposed pipeline is the exact type of hazardous liquid pipeline that the Iowa Legislature intended to be governed by Chapter 479B, regardless of the fact that the carbon dioxide being transported may not always meet a scientifically precise definition of “liquefied” at every moment in the transportation process.

While not controlling in this matter, federal courts have also recognized that pipelines transporting supercritical carbon dioxide are hazardous liquid pipelines within the meaning of the federal Pipeline Safety Act (hereinafter “PSA”). *Couser v. Shelby Cty.*, No. 1:22-CV-00020-SMR-SBJ, 2023 WL 4420442 (S.D. Iowa July 10, 2023); *Alverson v. Brown Cty.*, No. 3:22-CV-03018-RAL, 2023 WL 3764958 (D.S.D. June 1, 2023). The PSA, enacted in 1994, vests the authority to “prescribe minimum safety standards for pipeline transportation and for pipeline facilities” with the PHMSA. 49 U.S.C. § 60102(a)(2); 49 U.S.C. § 108. The federal Council on Environmental Quality has recognized that the PHMSA has regulatory authority over carbon capture pipelines such as the one proposed by Summit. 87 FR 8808, 8810, Mar. 18, 2022. Pipelines that transport carbon dioxide in its supercritical phase are also addressed in PHMSA’s regulations concerning hazardous liquid pipelines. 87 FR 33576, 33578 (June 2, 2022).

Therefore, it is clear from both Iowa law and federal law and regulations that Summit's proposed pipeline falls squarely within the definitions of hazardous liquid pipelines regulated by Iowa Code chapter 479B and the PSA. Summit is a "pipeline company" within the meaning of Iowa Code section 479B.2(4). Its request for injunctive relief in this matter is therefore governed by section 479B.15.

There is also sufficient evidence to establish that the required informational meeting was held in Hardin County in the manner required by Iowa Code section 479B.4(3). The Iowa Utilities Board held an informational meeting on September 13, 2021, in Steamboat Rock, Iowa. P's Ex. 3. Notice of the meeting was also published in the Eldora newspaper as required by section 479B.4(5)(b). P's Ex. 2.

The parties adamantly dispute whether Summit provided Mr. Kasischke with ten-day written notice of its intent to access his property to conduct surveys and examinations as required by Iowa Code section 479B.15. Summit provided evidence that it sent three letters that provided such notice via restricted certified mail in March and July 2022 and May 2023. P's Ex. 4, 5, 7, 8, 17, 18. At hearing, Mr. Kasischke went to great lengths to dispute Summit's contention that it sent him the notices via restricted certified mail as defined at Iowa Code section 618.15.

Iowa Code section 618.15 provides

1. The words "certified mail" mean any form of mail service, by whatever name, provided by the United States post office where the post office provides the mailer with a receipt to prove mailing.
2. The words "restricted certified mail" mean any form of certified mail as defined in subsection 1 which carries on the face thereof, in a conspicuous place where it will not be obliterated, the endorsement "Deliver to addressee only" and for

which the post office provides the mailer with a return receipt showing the date of delivery, the place of delivery, and person to whom delivered.

The evidence is clear that Summit sent the notices to Mr. Kasischke via the statutorily-prescribed method of restricted certified mail. The USPS-generated mailing labels for each of the three notice letters establish they were sent via “Restricted Delivery.” Pursuant to the USPS’s own standards, “restricted delivery” is an additional service that may be combined with “certified mail”. US Postal Service, *Mailing Standards of the United States Postal Service, Domestic Mail Manual*, § 503.3.0 (Jan. 22, 2023); 39 CFR § 111.1 (2022) (incorporating the Domestic Mail Manual by reference). “Restricted delivery service permits a mailer to direct delivery only to the addressee or addressee’s authorized agent.” *Domestic Mail Manual*, § 503.3.2. Pursuant to the USPS’s own published standards, restricted delivery service can only be delivered to an addressee or an addressee’s agent, which satisfies section 618.15(2)’s requirement that the mail be delivered to only the addressee. Further, USPS’s return receipts submitted into evidence by Summit also satisfy the statutory requirement for return receipts.

Additionally, Mr. Kasischke’s reliance on *Buss v. Gruis*, 320 N.W.2d 549 (Iowa 1982) and *Esterdahl v. Wilson*, 110 N.W.2d 241 (Iowa 1961) in support of his arguments regarding restricted certified mail is not persuasive. In those cases, parties were sent notice via certified mail instead of via the statutorily-required restricted certified mail. The Supreme Court held in both cases that even when a party receives actual notice, that notice is insufficient when a statute requires notice to be sent via a specific type of mailing. *Esterdahl*, 110 N.W.2d at 244; *Buss*, 320 N.W.2d 549 at 552. That is not the situation in this case. The evidence establishes that Summit sent the notice letters via restricted certified mail. The evidence also establishes

that Mr. Kasischke received the March 12, 2022 notice letter. Summit has met its requirement to provide him with notice of its intent to access his property.

Mr. Kasischke also argues that his alleged tenant was not provided notice pursuant to Iowa Code section 479B.15. The court finds that Summit took reasonable steps to ascertain the identity of anyone with an interest in the property, and was only informed of Mr. Mannetter's tenancy during trial. However, it does not agree with Summit's argument that section 479B.15 requires only "substantial" compliance. Summit predicates this argument upon the IUB's determination that a "good faith effort" to identify those requiring notice under section 479B.15 is sufficient when a landowner refuses to identify tenants.

Summit also cites the Iowa Supreme Court's holding in *Anstey v. Iowa St. Commerce Comm'n* in support of its substantial compliance argument. 292 N.W.2d 380, 385-86 (Iowa 1980). In *Anstey*, the Court addressed the sufficiency of notices provided regarding informational meetings that were held prior to power and light companies' filing of a petition for franchise pursuant to Iowa Code chapter 478.

The *Anstey* Court specifically noted that the fact that the notice was also published was sufficient to effectuate notice upon "those affected parties whose addresses were not known." *Id.* at 386. However, the statute at issue in *Anstey* – Iowa Code section 478.2 – is more analogous to Iowa Code section 479B.4 as opposed to Iowa Code section 479B.15. Both sections 478.2 and 479B.4 deal with public informational meetings for those affected by a proposed pipeline or utilities franchise, and both statutes require notice via publication in addition to notice to known interested parties.

The court does not find that *Anstey* establishes that “good faith efforts” are sufficient to satisfy Iowa Code section 479B.15’s notice requirements. The Iowa Legislature did not use identical language in sections 479B.4 and 479B.15 regarding notice; section 479B.15 does not provide for publication. Section 479B.15’s more rigorous notice requirement is also consistent with the notion that the right to enter upon private property should be subject to more stringent notice requirements than an informational meeting. The court is therefore unconvinced that Summit’s good faith efforts to provide ten-day notice to all parties equates to compliance with Iowa Code section 479B.15.

However, the court does not find that there is sufficient evidence to support Mr. Kasischke’s contention that Summit has failed to provide the required notice to all necessary persons. The only evidence that Mr. Mannetter purportedly cash rents from Mr. Kasischke is Mr. Kasischke’s own testimony. He contends that they have maintained a year-to-year rental agreement for nine years, however, he presented no current or prior written lease agreements. The court finds it highly improbable that he could not have produced at least a modicum of written evidence, whether in the form of a lease agreement, payment record, or other documentation, to support his assertion that a leasehold exists. Further, there was no evidence presented that Mr. Mannetter’s supposed lease is for property that is the subject of this action. Based upon the lack of any additional evidence, coupled with Mr. Kasischke’s clearly evasive and implausible testimony regarding Summit’s mailings, the court is unable to find that Mr. Mannetter is a “person residing on or in possession of the land” who is entitled to notice.

Based upon the foregoing, the court finds that Summit has met the statutory requirements for entry onto Mr. Kasischke's property. The court further finds that it is entitled to injunctive relief pursuant to Iowa Code section 479B.15.

IT IS THEREFORE ORDERED that Plaintiff Summit Carbon Solutions, LLC's Petition for Injunctive Relief Pursuant to Iowa Code Section 479B.15 is hereby granted. Defendant Kent Kasischke is hereby enjoined from interfering with or threatening to interfere with Plaintiff Summit Carbon Solutions, LLC's entry upon his land for the purpose of surveying and examining the land to determine the direction or depth of its proposed pipeline.

IT IS FURTHER ORDERED that the court costs of this action are taxed to Mr. Kasischke.

Clerk to provide copies to:
Attorneys and parties of record



State of Iowa Courts

Case Number
CVCV101911
Type:

Case Title
SUMMIT CARBON SOLUTIONS V. KENT KASISCHKE
OTHER ORDER

So Ordered

Amy M Moore, District Court Judge
Second Judicial District of Iowa

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